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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUELO BUELNA,

Defendant and Appellant.

A124206

(Alameda County
Super. Ct. No. CH41371)

Defendant was convicted on August 10, 2006, pursuant to a negotiated plea agreement, of commercial burglary and placed on probation. On February 18, 2009, following a contested evidentiary hearing, his probation was revoked and he was immediately sentenced to a term of two years in prison. No supplemental probation report was obtained to inform the court's sentencing decision. We hold that absent personal waiver by the Defendant, failure to obtain a supplemental report in such circumstances is prejudicial error.

I. BACKGROUND

On December 16, 2003, Samuelo Buelna¹ (Defendant) was charged by felony complaint with three counts of second degree commercial burglary (Pen. Code, § 459)² committed on or about December 14, 2003. He failed to appear for a court hearing in

¹ Defendant is identified with several different names in the record. We identify him with the primary name used to identify him on the abstract of the judgment from which he appeals.

² All statutory references are to the Penal Code unless otherwise indicated.

June 2004. He had apparently gone to Texas at some point, as he was convicted of felony credit card abuse in that state in March 2006, and ordered to serve six months in county jail. On June 16, 2006, the California complaint was amended to add a fourth count alleging failure to appear while on bail (§ 1320.5). On August 10, 2006, Defendant waived preliminary hearing and pled no contest to the first count of commercial burglary pursuant to a negotiated plea agreement, with the other charges being dismissed. After considering a September 8, 2006 probation report, the court placed Defendant on probation for a period of five years, with a term of nine months in county jail as a condition of that probation, as anticipated in the plea agreement.

On January 14, 2008, the district attorney filed a petition to revoke Defendant's probation. The petition alleged that on January 11, 2008, Defendant falsely told a police officer that he was not on probation or parole. Defendant appeared in custody on January 28, 2008, admitted the violation, and was reinstated on probation on the condition he serve an additional 27 days in jail.

On February 7, 2008, the district attorney filed a second petition to revoke Defendant's probation. The petition alleged that on January 10, 2008, Defendant intentionally rammed his vehicle into another car occupied by a woman who had refused his romantic advances, as well as her boyfriend and brother.³ Defendant did not appear at a February 22, 2008 hearing on the petition and the court issued a bench warrant for his arrest.

On November 6, 2008, Defendant appeared in Alameda Superior Court in custody and a hearing on the second petition to revoke his probation was set for November 20, 2008. The hearing was continued on several occasions and ultimately took place on February 11 and 18, 2009. While Defendant does not challenge the sufficiency of the

³ A declaration filed in support of the second petition states that Defendant was arrested for the incident on January 10, 2008. He apparently was released almost immediately because the declaration filed in support of the first petition to revoke states that he was spotted in public at about 1:00 p.m. on January 11, 2008, lied to a police officer who inquired about his identity and probation status, and was arrested on that date.

evidence to support the revocation, we review the evidence in light of the Attorney General's contention that any error in this instance was harmless.

Two of the victims (Sandy M. and Uriel M.), siblings who were related to Defendant by marriage, testified for the prosecution only reluctantly, under compulsion of subpoena.⁴ At the time of the incident Sandy lived across from Defendant in an apartment complex in Hayward. Defendant had wanted to date Sandy, and he told her "if [she] wasn't going to be his girl then [she] wasn't going to be nobody else's girl." Defendant had threatened to hurt Sandy's boyfriend, Isaac C., and Defendant and Isaac talked about beating each other up.

On the evening of January 10, 2008, Sandy, Uriel, Isaac, Defendant, and other relatives attended church. Sandy, Uriel and Isaac left the church in Isaac's car at about the same time Defendant was leaving in his truck. As Isaac was driving toward Sandy's and Defendant's home in the right lane, Sandy noticed Defendant's truck behind them in the left lane. Isaac moved his car into the left lane in front of Defendant's truck and started slowing down for a red light. Uriel, who was sitting in the back seat of Isaac's car, heard the engine in Defendant's truck rev up. The truck hit the back of Isaac's car with sufficient force to cause it to spin in circles three times and causing Uriel's head to hit the back windshield of Isaac's car. Defendant drove away. While he may have stopped briefly, Defendant did not get out of the car to check on the passengers of Isaac's car.

Relatives picked up the victims and took them to the hospital, where they spoke to police. Sandy and Uriel dictated, reviewed and signed statements describing the incident. Sandy and Uriel did not see Defendant again until they appeared in court to testify, even though Sandy had seen Defendant almost daily before the incident. Defendant called Uriel about a week after the incident and apologized, explaining that the incident occurred because "he was mad."

⁴ The victims said they did not want Defendant to be punished for the incident. At the outset of the hearing, their father also unsuccessfully sought leave to address the court to request that the charges against Defendant be dropped.

Defendant's sister testified and opined that Sandy was not a truthful person. She claimed that Defendant was with her in her home from 6:00 p.m. until about midnight on the evening of January 10, 2008. At about 9:00 p.m., Sandy's mother or aunt called and told her Defendant had just crashed into a car carrying Sandy and they were going to call the police. She said that Defendant left her home at about midnight.

The court credited the testimony of Sandy and Uriel and found that Defendant deliberately ran his car into Isaac's car. The court found Defendant in violation of his probation. After a sidebar conference with counsel, the court sentenced Defendant to the midterm of two years in state prison on the underlying burglary charge.

II. DISCUSSION

A. *Failure to Obtain Supplemental Probation Report*

Defendant argues the court erred by failing to order a supplemental probation report before imposing sentence. We agree.

Section 1203.2, subdivision (b) provides: "Upon its own motion or upon the petition of the probationer, probation officer or the district attorney . . . , the court may modify, revoke, or terminate the probation of a probationer pursuant to this subdivision. . . . The court shall refer its motion or the petition to the probation officer. *After the receipt of a written report from the probation officer, the court shall read and consider the report* and either its motion or the petition and may modify, revoke, or terminate the probation of the probationer" (Italics added.) California Rules of Court, rule 4.411(c),⁵ which applies generally to presentence investigations and reports, provides: "The court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared."

Relying on these two authorities (§ 1203.2, subd. (b), and rule 4.411(c)), *People v. Dobbins* held that a trial court erred when it sentenced the defendant to prison eight months after his original sentencing hearing without first obtaining a supplemental

⁵ All rule references are to the California Rules of Court.

probation report. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 180–181 (*Dobbins*).) “Statutory authority and the California Rules of Court specify the circumstances under which the trial court must prepare a supplemental or updated report. Section 1203.2, subdivision (b), requires referral to the probation officer, preparation of a written report, and its consideration by the court upon a petition for revocation of probation. But a supplemental or updated report is not necessarily needed in some cases where a recent report has been prepared that may be incorporated by reference. . . . [citing rule 4.411(c)].” (*Id.* at p. 180, fn. omitted.) “The Advisory Committee Comment to [rule 4.411(c)] suggests that a period of more than six months may constitute a significant period of time, even if the defendant remains incarcerated and under the watchful eyes of correctional authorities. . . . [¶] Here, the original probation report was prepared approximately eight months before the sentencing hearing at issue. This period was well in excess of the six months referred to by the Advisory Committee, and it included approximately two months when defendant was not under the watchful eyes of custodial authorities but was rather released on probation, when he committed the conduct for which his probation was revoked. Accordingly, we hold the trial court erred by proceeding without ordering a supplemental or updated report.” (*Id.* at p. 181, fn. omitted.)

In this case the only probation report prepared on Defendant was dated September 8, 2006, two and one-half years before the prison term was imposed. The court’s probation and sentencing determinations were discretionary: Defendant remained eligible for probation and even if probation were not reinstated, the court had discretion in its choice of imposing a prison term within the statutory triad. (§§ 1203; 1203.2, subd. (c); 1170, subd. (b).) An updated report would have provided information relevant to the exercise of this discretion.

The People acknowledge the authority of *Dobbins*. They argue, however, that the failure to obtain a supplemental report in this instance caused Defendant no prejudice. They contend that in light of the information disclosed in the original probation report and the court record—the facts of the underlying offenses, the aggravating circumstances

cited in the original probation report, and the facts of the subsequent probation violations—there was no reasonable probability Defendant would have received a more favorable sentence than the middle prison term had the trial court ordered a supplemental report.

We disagree. It would be speculative to conclude that no information that might be disclosed in a supplemental report covering a 13-month period since the previous reinstatement of probation would, in combination with the information in the original report (which recommended probation), persuade the court to either reinstate Defendant on probation or impose a more lenient sentence than the two-year prison term. As other courts have observed, “[W]e cannot know ‘what a current report, made by a professional probation officer, might have disclosed, nor in what light such a report would have presented appellant as of the time of the hearing.’” (*People v. Causey* [(1964)] 230 Cal.App.2d 576, 579.)” (*People v. Mercant* (1989) 216 Cal.App.3d 1192, 1196, disapproved on different grounds by *People v. Bullock* (1994) 26 Cal.App.4th 985, 988–989.)

We conclude the trial court erred by failing to obtain a supplemental report when it sentenced Defendant after it found he had violated his probation, and that the record does not establish that the error was harmless.⁶ (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Waiver

The People argue that the “record suggests the parties agreed to an immediate sentencing without an updated probation report. (But see . . . § 1203, subd. (b)(2)(E).) The claim is therefore waived.”

Waiver is the intentional relinquishment of a right, whereas forfeiture is the failure to make the timely assertion of a right. (*People v. Simon* (2001) 25 Cal.4th 1082, 1097,

⁶ In determining that a supplemental probation report was required, we do not in any way suggest that the sentence imposed by the court was inappropriate or constituted an abuse of discretion. We hold only that §1203.2, subdivision (b) and rule 4.411(c) require consideration of a supplemental probation report in these circumstances before sentencing discretion is exercised.

fn. 9.) The People appear to contend that Defendant affirmatively agreed to sentencing without an updated report. They also seem to recognize, however, that the Penal Code section they reference, section 1203, subdivision (b)(2)(E), is contrary to or inconsistent with their contention. (See Cal. Style Manual (4th ed. 2000) § 1:4 [nature and strength of cited authority].) Section 1203, subdivision (b)(2)(E) authorizes an *express* waiver of the requirement that a probation report be provided to the attorneys at least five days before the sentencing hearing, and requires the waiver to be placed on the record.⁷ Therefore, we understand the People to argue that Defendant affirmatively relinquished his right to a supplemental probation report when his counsel participated in an unrecorded sidebar conference with the judge in response to the court’s request for sentencing comment by counsel.

After the presentation of evidence and after the court found that Defendant had violated his probation, the court asked, “[Prosecutor], do you want to discuss what the appropriate consequence should be?” The prosecutor asked for a state prison sentence and then asked, “Can we approach?” Following a sidebar conference, defense counsel stated, “Based on our conversation at the bench, it’s submitted.” The court then stated, “All right. Just so the record is clear and everybody knows, we don’t have any secret conversations up here. There was a discussion at the bench about the potential sentence or consequences, [Defendant]. I think your attorney has tried to work on your behalf and discussed with you the various options that may be available, and obviously, it’s entirely your right to not, you know, to take -- to do what you want to do in the sense of having a

⁷ “ . . . The time within which the report shall be made available and filed *may be waived by written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court.*” (§ 1203, subd. (b)(2)(E), italics added.)

Section 1203, subdivision (b)(4) similarly requires express waiver of the requirement to provide a probation report at any time. “The preparation of the report or the consideration of the report by the court *may be waived only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court*, except that there shall be no waiver unless the court consents thereto. . . .” (Italics added.)

hearing, which you have done. And that's entirely your right and nobody ever would have intended to deny you that right."

There was no express waiver of the right to a supplemental probation report. (See § 1203, subd. (b)(4).) On the contrary, the court assured Defendant that the attorneys had not made any private agreement with the court regarding sentencing. In any event, as the People implicitly acknowledge, section 1203, subdivision (b)(4) requires any waiver of a probation report be made expressly on the record—in a filed written stipulation or an oral stipulation made in open court.⁸ No such waiver appears in the record.

C. Forfeiture

We also consider whether Defendant forfeited his claim of error because he did not affirmatively ask the trial court to obtain a supplemental probation report and did not object before sentencing to the absence of a supplemental report.

Relying on section 1203, subdivision (b)(4), *Dobbins* holds that the requirement of a supplemental probation report is not subject to forfeiture due to a failure to object, but must be expressly waived on the record. (*Dobbins, supra*, 127 Cal.App.4th at p. 182.)⁹ As noted, section 1203, subdivision (b)(4) requires an express on-the-record waiver of the requirement to obtain a probation report before sentencing.

Dobbins assumes without further analysis that section 1203, subdivision (b)(4) applies to the requirement to obtain a supplemental report after revocation of a defendant's probation pursuant to section 1203.2, subdivision (b). We do not find self-evident that section 1203, subdivision (b)(4) applies in the probation revocation context. However, after reviewing the statutory language and related case law, we conclude that section 1203, subdivision (b)(4) does apply in the circumstances of this case. That is, it applies if the court initially suspends imposition of sentence when it

⁸ See footnote 7.

⁹ Two pre-*Dobbins* decisions that held the right to a supplemental probation report was subject to forfeiture are no longer good law because they were decided before the enactment of section 1203, subdivision (b)(4). (See *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1556; *People v. Oseguera* (1993) 20 Cal.App.4th 290, 294; Stats. 1996, ch. 123, § 1 [adding § 1203, subd. (b)(4)].)

grants a defendant probation, subsequently revokes probation, and contemplates imposing a sentence following the revocation of probation.

Section 1203, subdivision (b)(4) logically applies to the cases described in section 1203, subdivision (b)(1), the lead provision of the same statutory subdivision. Section 1203, subdivision (b)(1), provides: “Except as provided in subdivision (j) [which is not relevant here], if a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court” While this language most directly applies to the original sentencing of a defendant eligible for probation, courts have also applied it to other situations when a court is contemplating pronouncement of a judgment.

In *People v. Rojas*, the Supreme Court held that section 1203, subdivision (b)(1) requires a supplemental or updated probation report when a defendant’s original sentence is reversed on appeal and the matter is remanded for resentencing. (*People v. Rojas* (1962) 57 Cal.2d 676, 682.) “[T]he statute itself provides: ‘. . . in every felony case in which the defendant is eligible for probation, *before any judgment is pronounced*, [. . .] the court must *immediately* refer the matter to the probation officer. . . .’ (Emphasis added.) By its express terms the statute requires before the pronouncement of *any* judgment an *immediate* referral to the probation officer. [. . .] We can conclude only that the Legislature intended, with each contemplated pronouncement of judgment and the concurrent determination of whether to grant or deny probation where an accused is otherwise eligible, that a defendant is entitled to have a current report before the trial judge.” (*Ibid.* [discussing former § 1203, subd. (b)(1), as amended by Stats. 1969, ch. 522, § 2, p. 1134]; see *People v. Cooper* (1984) 153 Cal.App.3d 480, 483 [*Rojas* still good law even after Legislature deleted “any” from “before any judgment is pronounced” in § 1203, subd. (b)(1)].) A court of appeal has similarly required a supplemental report pursuant to section 1203, subdivision (b)(1) when sentencing was substantially delayed due to a defendant’s failure to appear at sentencing. (*People v. Mercant, supra*, 216 Cal.App.3d at pp. 1194–1196.)

We conclude that section 1203, subdivision (b)(1)—and thus section 1203, subdivision (b)(4)—applies when a court contemplates sentencing a probationer following revocation of probation if the court suspended imposition of sentence when it placed the defendant on probation. Section 1203.2, subdivision (c) provides that, when imposition of sentence was originally suspended, the court may “pronounce judgment” following revocation of probation. In contrast, if the court originally imposed sentence and suspended its execution, “the judgment has been pronounced” and the court may simply “order that the judgment shall be in full force and effect.” (*Ibid.*) In the former case, section 1203, subdivision (b)(1) applies because the court contemplates pronouncement of judgment. In the latter case, it may not.¹⁰

Because section 1203, subdivision (b)(1) applies here, section 1203, subdivision (b)(4) also applies, requiring an express on-the-record waiver of the right to an updated probation report. To hold otherwise would be inconsistent, in our view, with the legislative directive. Because Defendant did not expressly waive his right to an updated report on the record, his claim of error was neither waived nor forfeited.

¹⁰ The issue is not before us and we therefore express no opinion about whether section 1203, subdivision (b)(4) applies if the court initially suspends execution of an imposed sentence when it places a defendant on probation. Because *Dobbins* presented this factual circumstance, we neither endorse nor reject the opinion’s holding in that context. (See *Dobbins*, *supra*, 127 Cal.App.4th at pp. 178, 180, 182.)

III. DISPOSITION

The judgment is vacated. The case is remanded for resentencing following the preparation of a supplemental probation report.

Bruiniers, J.

We concur:

Simons, Acting P. J.

Needham, J.